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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 568

ROBERT G. LASSITER,

Petitioner,

vs.

A. H. POWELL, R. R. HERRING, E. N. CLEMENT AND JOHN S. WATKINS, TRUSTEES FOR THE CREDITORS AND STOCKHOLDERS OF THE FIRST NATIONAL BANK OF GRANVILLE,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MURRAY ALLEN,
Attorney for Petitioner.

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Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Your petitioner, Robert G. Lassiter, feeling himself aggrieved by a certain judgment or decree of the United States Circuit Court of Appeals for the Fourth Circuit, rendered in the case of Robert G. Lassiter, Appellant, *vs.* A. H. Powell, R. R. Herring, E. N. Clement and John S. Watkins, Trustees for the Creditors and Stockholders of the First National Bank of Granville, Appellees, which judgment or decree was rendered and became final for the purpose of review in this Court on the 5th day of November, 1947, prays this Honorable Court to issue its writ of certiorari, as authorized so to do by the provisions of Section

347(a), Title 28, of the United States Code, addressed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding it to certify and transmit to this Court, on a day therein named, a full and complete transcript of the record and all proceedings had in the courts of the United States in said case in so far as the same appear of record or on file in said United States Circuit Court of Appeals for the Fourth Circuit, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such relief and remedy in the premises as this Court may deem appropriate and justice and right may require.

I

The case may be summarized and the matter involved may be stated briefly as follows:

This is a suit in equity on two lost notes executed by Robert G. Lassiter, the defendant, and payable to National Bank of Granville, Oxford, N. C. One note was dated November 25, 1932, for $15,500.00 and was payable in ninety days; the other was dated February 11, 1933, for $1,000.00, and was payable in sixty days. The plaintiffs are the trustees for the creditors and stockholders of the First National Bank of Granville, Oxford, N. C. The District Court found the facts and entered judgment for plaintiffs for the face value of the notes with interest. The principal contention of defendant in the trial court and in the Circuit Court of Appeals was that this action could not be maintained on the two notes for the reason that a note executed by Robert G. Lassiter, the defendant, in the sum of $15,500.00, dated August 21, 1933, and payable to the First National Bank of Granville one year after date, was accepted by plaintiffs in *settlement* of all of defendant's notes held by the bank, aggregating $17,000.00, which included the notes in suit.

It is contended by defendant that the acceptance of the note for $15,500.00 in settlement of the two notes in suit appears as matter of law from findings of fact of the trial court, which were not disturbed by the Circuit Court of Appeals, and by the undisputed testimony of one of the plaintiffs.

NOTE: References herein to Record pages are also references to pages of Appendix to Brief for Appellant in the Circuit Court of Appeals.

II

The basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question is as follows:

This is a suit in equity on two lost notes executed by Robert G. Lassiter, defendant, and payable to the National Bank of Granville, Oxford, N. C. One note was dated November 25, 1932, for $15,500.00 and was payable in ninety days; the other was dated February 11, 1933, for $1,000.00; and was payable in sixty days. The plaintiffs are the trustees for the creditors and stockholders of the First National Bank of Granville, Oxford, N. C. The District Court found the facts and entered judgment for plaintiffs for the face value of the notes with interest. From this judgment, defendant appealed to the Circuit Court of Appeals. The appeal was argued October 8, 1947, and decided November 5, 1947, by an opinion (164 F. (2d) 186), in which the Circuit Court of Appeals affirmed the judgment of the District Court of the United States for the Eastern District of North Carolina. The principal contention of defendant in the trial court and in the Circuit Court of Appeals, and the question presented by this petition, was that this action could not be maintained on the two notes for the reason that a note executed by Robert G. Lassiter, the defendant,

in the sum of $15,500.00, dated August 21, 1933, and payable to the First National Bank of Granville one year after date, was accepted by plaintiffs in *settlement* of all of defendant's notes held by the bank, aggregating $17,000.00, which included the two notes in suit.

Section 347, Title 28, of the United States Code, provides:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower courts, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."

III

The question presented and the reasons relied on for the allowance of the writ are as follows:

Should judgment of the Circuit Court of Appeals, affirming judgment of the District Court in equity for the amount of two lost notes, one for $15,500.00 and one for $1,000.00, be reversed when it appears from facts found by the District Court, which are undisturbed by the Circuit Court of Appeals, and the undisputed testimony of one of the plaintiffs that a note executed by defendant for $15,500.00 had been accepted by plaintiffs in settlement of the two notes in suit?

The Circuit Court of Appeals holds in an opinion filed November 5, 1947, that the note for $15,500.00, tendered in settlement of the two notes in suit, was not accepted and that the District Court was not in error in rendering judgment for plaintiffs.

In the Findings of Fact by the trial court will be found the following facts relative to acceptance of the compromise note:

"1. The plaintiffs are residents of Granville County, North Carolina, the defendant is a resident of the State of Florida, and the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. The notes sued on are (1) a note in the principal amount of $15,500.00 dated November 25, 1932, due ninety days after date and bearing interest at six per cent from maturity, and (2) a note in the principal amount of $1,000.00 dated February 11, 1933, due sixty days after date and bearing interest at six per cent from maturity. The aggregate indebtedness represented by the two notes was originally owed by Robert G. Lassiter & Company to the National Bank of Granville and the First National Bank of Oxford, which two institutions, prior to the execution of the notes in suit, were merged and became the First National Bank of Granville. The defendant in this action was the President and principal stockholder of Robert G. Lassiter & Company and had personally endorsed the original notes in renewal of which the personal notes of the defendant now in suit were executed.

"2. On and prior to March 5, 1933, the First National Bank of Granville was a national banking institution doing business in Oxford, North Carolina, and had acquired certain assets formerly belonging to the National Bank of Granville and the First National Bank of Oxford. Among such assets were the two notes payable to the National Bank of Granville, which are in suit. These notes and others, aggregating $17,500.00, were secured by bond executed by Consolidated Indemnity and Insurance Company, dated November 19, 1932, in the amount of $17,500.00 (Rec., p. 160).

"3. On March 5, 1933, the First National Bank of Granville was closed by proclamation of the President of the United States and ordered to suspend further operations as a banking institution; shortly thereafter and prior to August, 1933, J. W. Medford was appointed as Conservator of said Bank by the Comptroller of the Currency and until about December 19, 1933, was the appointed and acting Conservator of the Bank with such duties and authority as defined and limited by United States Code, Title 12, Sections 203 and 192. Prior to March 5, 1933, the First National Bank of Granville had pledged certain of its assets to the Reconstruction Finance Corporation and among such assets were the two notes in suit:

"4. On August 30, 1933, the defendant addressed a letter to, 'First National Bank of Granville, Oxford, N. C., Attention: Mr. J. W. Medford, Conservator,' as follows:

'GENTLEMEN:

'With further reference to my conversation with you relative to my notes, I wish to advise as follows:

'You hold a note for $4,200.00, which is a renewal of a balance of two notes originally given to W. Z. Mitchell. The note which you hold is, I understand, endorsed by the bank as administrator of the estate of W. Z. Mitchell. You are familiar with the facts with respect to this note. The sum of $500.00 in cash was paid by me on the purchase price of the interest of Mr. Mitchell in the Bullock and Mitchell Warehouse. A note for $4,500.00 was given to Mr. Mitchell at the request of the bank and payments of $300.00 were later made on this note. The bank received the sum of $800.00 from me. I have never received a penny from Mr. Mitchell or the Mitchell estate and the purchase of the Mitchell interest in the property was never consummated. At the time the renewal note was given to the bank Mr. Yancey, of your bank, advised that you would endeavor to work out the Mitchell proposition in such way that

I would be relieved of further liability and the $800.00 which I had paid would be refunded.

'You hold three notes executed by me aggregating $17,000.00 and guaranteed by bond of the Consolidated Insurance & Indemnity Co. These notes I understand are all past due. It is my desire to put the entire matter in the most satisfactory shape possible at this time. I have, therefore, arranged with the Consolidated Insurance & Indemnity Co. for a new agreement guaranteeing the payment of my note in the sum of $15,500.00, payable August 21, 1934. In arriving at the amount I have taken credit for the sum of $800.00 paid as a part of the principal of the Mitchell transaction and the sum of $860.00 paid to you as interest on the Mitchell note. I feel that as you have received these payments they should be applied as a credit on my note. I also feel that under the circumstances I should not be expected to undertake payment of the Mitchell note. I am authorized by the Consolidated Insurance & Indemnity Co. to offer you my note in the sum of $15,500.00 guaranteed by that Company in settlement of all of the notes signed by me, which you now hold.

'I wish to say that this is the best proposition which I am able to work out and I am doing this in order to put my account with you in the best possible shape under present conditions.

'I am handing you herewith note and guaranty, subject to and in compliance with the conditions above set out.

'Very truly,

'(S.) Robt. G. Lassiter.'

"There were attached to this letter a note of the defendant and a bond executed by Consolidated Indemnity & Insurance Company, each in the amount of $15,500.00. The letter, enclosing note and bond, came into the possession of J. W. Medford, Conservator, on or immediately after its date. As of the date of the receipt of the letter, note and bond, W. T. Yancey was a Director of the Bank, his resig-

nation as President having been accepted at a meeting of the Directors of the Bank on January 10, 1933 (Rec., pp. 160, 161, 162).

* * * * * * *

"11. On or about May 29, 1934, the Consolidated Indemnity & Insurance Co. was forced into liquidation, and on February 8, 1937, the plaintiffs herein filed with the Superintendent of Insurance of the State of New York, as Liquidator for such Company, a claim in the principal sum of $16,500.00, which was specifically based upon the notes in suit and the indemnity contract of the Consolidated Indemnity & Insurance Co., which undertook to guarantee payment of the notes in suit. This claim was thereafter allowed for fifty per cent of its face, that is, $8,250.00, but prior to this action by the Liquidator the plaintiffs were required to assign to the Liquidator the two notes in suit as well as the alleged compromise note of $15,500.00, dated August 21, 1933, and on February 8, 1937, such assignment was made in writing and signed under oath by R. R. Herring, Vice Chairman of plaintiffs, and is in words and figures as follows:

> 'For value and without recourse the Liquidating Trustees of the First National Bank of Granville do hereby transfer, make over and assign to the Superintendent of Insurance of the State of New York, as Liquidator of the Consolidated Indemnity & Insurance Company, his successors and assigns, the hereto attached three notes of Robert G. Lassiter, for identification described as follows:
>
> 'First Note: Dated at Oxford, N. C., November 25, 1932, in the sum of $[illegible].00, payable ninety days after date to the National [illegible] of Granville or order (Rec., p. 164).
>
> 'Second Note: Dated at Oxford, N. C., February 11, 1933, in the sum of $1,000.00, payable sixty days after date to the National Bank of Granville, or order.

'Third Note: Dated at Oxford, N. C., August 21, 1933, in the sum of $15,500.00, payable on or before one year after date to the First National Bank of Granville, or order.

'All of the aforesaid notes are at the date of this assignment the property of the Liquidating Trustees of the First National Bank of Granville.

'This February 8, 1937.

'Liquidating Trustees of the
'First National Bank of Granville,
'By R. R. Herring,
'Vice-Chairman.'

"This claim was proved with the Liquidator of the Consolidated Indemnity & Insurance Co. for the benefit of the defendant, who requested and urged plaintiffs to do so. At the time of filing the claim for payment of the dividend of $8,250.00, the amount in which the original claim had been allowed, the plaintiffs took from the Liquidator a written agreement allowing plaintiffs, at their option, to require at any time reassignment to them of the three notes transferred upon refund to the Liquidator of all dividends theretofore received. The notes in suit and the alleged compromise note were delivered to the Liquidator of the Consolidated Indemnity & Insurance Co. and were assigned by separate paper writing as set out, but they were not actually endorsed by the plaintiffs or any one of them, or by any one of them. Between the date of the allowance of the claim for $8,250.00 and the 11th day of April, 1944, plaintiffs received dividends on the claim in the aggregate of $495.00, and prior to April 11, 1944, the plaintiffs made a refund to the Liquidator of this amount and demanded reassignment and redelivery of the notes which had been transferred to the Liquidator as set out. As of this date the two notes in suit had been lost and have not been found after a careful,

thorough, and diligent search in such quarters and in such places as it is reasonable to believe they might be located (Rec., pp. 164, 165, 166).

"12. On April 11, 1944, the Liquidator of the Consolidated Indemnity & Insurance Co. executed a paper writing transferring and assigning to the plaintiffs all of the right, title and interest in and to the two notes in suit which had been lost, and the alleged compromise note, all of which had been assigned to the Liquidator on February 8, 1937, as set out.

"13. At the time of the transfer of the three notes to the Liquidator on February 8, 1937, plaintiffs delivered to the Liquidator the three bonds of the Consolidated Indemnity & Insurance Co. guaranteeing payment of the notes, and at the time of the reassignment of the notes to the plaintiffs on April 11, 1944, these three bonds were returned to plaintiffs (Rec., p. 166).

* * * * * * *

"19. The agreement by which plaintiffs were originally made liquidating trustees authorized them to sell, compromise, and accept renewals incident to the liquidation. As of December 19, 1933, the First National Bank of Granville had become solvent as the result of waivers executed by depositors of forty per cent of their claims, and a sale to the Oxford National Bank of a sufficient portion of its assets to pay waiving depositors the remaining sixty per cent. Soon after December 19, 1933, the original Liquidating Trustees moved to their new quarters the 'Class B Assets' which had been transferred to them, and also the defendant's letter of August 30, 1933, as well as the note and bond, each in the amount of $15,500.00, therein mentioned (Rec., p. 167).

* * * * * * *

"21. The bond of the Consolidated Indemnity & Insurance Co. transmitted with defendant's letter of August 30, 1933, contains the following language:

" 'Whereas, the said indebtedness has now been reduced to a total of not more than Fifteen Thousand Five Hundred and 00/100 Dollars ($15,500.00) and the bank is now willing to renew the said note or notes of R. G. Lassiter, so that such note or notes, and renewals thereof will be fully paid on or before August 21, 1934' " (Rec., p. 168).

In addition to the foregoing facts, we call particular attention to the following testimony of R. R. Herring, Vice Chairman of the Liquidating Trustees, plaintiffs, who appears from the evidence to have been in charge of all negotiations of the Liquidating Trustees dealing with the notes of the defendant, with respect to the finding of Lassiter's letter in the early part of 1944:

"Q. What was the occasion of finding the letter?

"A. We had been trying to get together with Mr. Lassiter in some way to see if we couldn't get liquidation of these notes and get him to come to some agreement and in those conversations it came up something about this note, the first I had ever heard of it, his giving his note at the bank to cover all of his indebtedness.

"Q. Who said something about it?

"A. Mr. Lassiter. We went back and searched the records. I don't know how many hours I did spend trying to find any information I could get on this case and I found this letter and when I found it I thought, 'Sure, here is Mr. Lassiter's letter and his admission and I am sure we can get together now.'

"Q. The reason you say that is because you said, 'Here is where we find note of Mr. Lassiter and letter from him. He certainly will admit he signed this note and letter along

with it,' and you reached the conclusion for that reason he would be agreeable?

"A. We were negotiating for compromise.

"Q. Why did you jump to the conclusion that Mr. Lassiter would agree to a compromise?

"A. Because he admitted he owed the note.

"Q. You knew he would admit writing the letter and admit the execution of the note and admit having given it to Medford?

"A. I didn't know whether he would admit all those things. I knew he would admit writing the letter, which he did.

"Q. Where did you find the letter?

"A. I couldn't tell you what file it is in but most of those files were more or less back numbers now stored over my store and through some of the files in looking for this letter or looking for any information I could find I found this letter.

"Q. You found the letter and already had the note and bond?

"A. Yes, sir.

"Q. That is referred to in the letter?

"A. Yes, sir.

"Q. Since you found that letter in January, 1944, you have kept the note?

"A. We haven't had the note since we found the letter in our possession. We have got title to it" (Rec., pp. 56 to 58).

Petitioner contends that it appears as matter of law from the foregoing findings of fact and undisputed testimony that contrary to the decision of the Circuit Court of Appeals and in accordance with the law applicable in the State of North Carolina, plaintiffs accepted defendant's note for $15,500.00 in full settlement of the two notes in suit.

It is further contended by defendant, petitioner, that plaintiffs, respondents, accepted the compromise note (1) by their conduct and (2) by their silence, and that, if plaintiffs did not know that the note of August 21, 1933, for $15,500.00 was given in compromise, and not as a renewal note, they were put on notice by the bond securing the note that it was in settlement of the notes in suit and it was their duty to investigate and that such investigation would have disclosed the fact that the note was in compromise of all of defendant's notes held by the bank and transferred to plaintiffs, including the two notes in suit.

Petitioner contends that he suffered injury in that the judgment requires him to pay notes which were paid prior to the institution of this suit in the amounts of $15,500.00, with interest at six per cent from the 25th day of February, 1933, until paid, and $1,000.00, with interest at the rate of six per cent from the 11th day of April, 1933, until paid.

WHEREFORE, because of said decision and judgment the foregoing important question of local law was decided in a way probably in conflict with applicable local decisions, your petitioner prays that a writ of certiorari to review said judgment be issued to said United States Circuit Court of Appeals for the Fourth Circuit, as in such cases is provided by Section 347(a), Title 28, of the United States Code.

ROBERT G. LASSITER,
Petitioner,

By MURRAY ALLEN,
His Attorney.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 568

ROBERT G. LASSITER,

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vs.

A. H. POWELL, R. R. HERRING, E. N. CLEMENT AND JOHN S. WATKINS, TRUSTEES FOR THE CREDITORS AND STOCKHOLDERS OF THE FIRST NATIONAL BANK OF GRANVILLE,

Respondents

BRIEF

Petitioner, defendant, submits that the findings of fact by the trial court and the undisputed testimony of R. R. Herring, one of the plaintiffs, all of which is quoted in the foregoing petition, establish as matter of law and in accordance with the law of the State of North Carolina, that plaintiffs accepted the note of defendant for $15,500.00, dated August 21, 1933, in settlement of the two notes in suit for $15,500.00 and $1,000.00.

"Where the offeree exercises dominion over things which are offered him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance."

American Law Institute's Restatement of Contracts, Sec. 72(2).

"Such acceptance may be manifested by words of conduct showing that the offeree means to accept; for, while it is generally held that the intention to accept is a necessary element of acceptance, the question of intent may usually be resolved by what the offeree did or said. As a general rule, his mere silence will not amount to assent; but if he declines to speak when speech is admonished at the peril of an inference from silence, his silence may justify an inference that he admits the truth of the circumstance relied on or asserted."

May v. *Manzies,* 184 N. C. 150.

"It is true that in order to valid agreement the minds of the parties must have met on the same thing at one and the same time; but this is said in reference to the common intent as contained and expressed in the communications had between them. This may be by words, written or unwritten, or by conduct, both or either; but it must be in some way expressed, or it does not bind, and the position may not be allowed that when the parties have made an agreement for valuable consideration, clearly expressing their common intent and purpose in one way, this can be frustrated or altered by the secret and undisclosed intent of one of the parties to the contrary."

Rodgers v. *Bell,* 156 N. C. 378.

That plaintiffs exercised dominion over the compromise note is beyond dispute. They transferred and delivered the note to the Liquidator of Consolidated Indemnity and Insurance Company in support of a claim based upon bonds executed by that company guaranteeing payment of certain of defendant's notes, including the compromise note and in the document effecting the transfer the compromise note is specifically described and it is recited that this note and

the two notes in suit were "at the date of this assignment the property of the Liquidating Trustees of the First National Bank of Granville," plaintiffs in this action.

It is also undisputed, as appears from the testimony of R. R. Herring, one of the plaintiffs, Trustees, and their Vice-Chairman, that he found defendant's letter of August 30, 1933, among the papers of the Trustees in the early part of 1944, and that instead of disclaiming any right to said note, the Trustees actually claimed title to the note and did not disclaim the right to recover on this note until suit was brought and was being heard in the District Court for the Eastern District of North Carolina at Fall Term, 1946.

The witness Herring testified that when the rights on the three notes were reassigned to the plaintiffs by the Liquidator of Consolidated Indemnity and Insurance Company, he notified defendant that plaintiffs would assign to him the rights which they had gotten back by the reassignment. As to this however, he testified: "That was part of our negotiations, that the notes had been lost and we had reassignment and wanted to get settlement on that basis. Q. You only agreed to do that in the event he made settlement? A. I suppose so" (Rec., p. 60).

Petitioner further submits that the plaintiffs, trustees, were charged with the duty to make an investigation which would have disclosed that the note of August 21, 1933, was given in payment of the notes in suit.

"A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made the necessary effort to learn the truth of the matters affecting his interests."

Austin v. *George*, 201 N. C. 380;
Blankenship v. *English*, 222 N. C. 92;
Wynn v. *Grant*, 166 N. C. 39.

Certainly the language of the bond which was delivered with the note, quoted in the Court's finding of fact No. 21 (Rec., p. 169), was sufficient to put plaintiffs on notice and charge them with the duty to investigate and it is clear that investigation would have disclosed that the note of August 21, 1933, for $15,500.00 had been given in settlement of the notes in suit.

It is not sufficient to say that plaintiffs dealt with the compromise note as a renewal note. Every fact in connection with the transaction shows that the compromise note was tendered in *settlement* and not renewal.

The acceptance of an offer of compromise cannot be qualified by any reservations on the part of the party accepting.

Kerr v. *Sanders,* 122 N. C., 635;
Sylva Supply Co. v. *Watt,* 181 N. C. 432;
DeLoache v. *DeLoache,* 189 N. C. 394;
Pruden v. *Railroad,* 121 N. C., 509.

"In *DeLoache* v. *DeLoache,* 189 N. C., at p. 398, the learned former *Associate Justice Varser,* of this Court, in reference to this subject said: 'Business transactions cannot be safely conducted upon secret reservations of mind that are totally inconsistent with the open acts. It was open to plaintiff to refuse to accept check No. 2 if he was unwilling to affirm its provisions in every respect. When he accepted its proceeds he made effective and binding its every stipulation. *Ore Co.* v. *Powers,* 130 N. C. 152; *Aydlett* v. *Brown,* 153 N. C. 334.' "

Lawson v. *Bank,* 203 N. C. 368, at p. 372.
Durant v. *Powell,* 215 N. C. 628.

We repeat in conclusion petitioner's prayer that a writ of certiorari be issued by this Court to the Circuit Court of

Appeals to the end that the judgment of that Court may be reviewed.

Respectfully submitted,

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